UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO

IN RE:

* CASE NUMBER 00-41218

DONALD A. HARMAN,

* CHAPTER 7

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Debtor. * HONORABLE KAY WOODS

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This matter came on for hearing on September 2, 2004 upon the order to appear and show cause dated August 13, 2004 directing Joseph Davilla, Sr. ("Creditor Davilla") to appear before the Court. The order to appear and show cause had been entered in response to a motion of Debtor Donald A. Harman ("Debtor Harman"). On May 12, 2004, Debtor Harman had filed a motion to reopen his bankruptcy case to "stop creditor harassment and an improper foreclosure." The bankruptcy court entered an order dated June 1, 2004 permitting Debtor Harman's case to be reopened for the limited purpose to determine "why there is continued efforts by Creditor Davilla Sr, (sic) to collect a debt that was discharged on February 12th of 2001."

Debtor Harman appeared at the hearing pro se and Creditor Davilla was represented at the hearing by Matthew C. Giannini, Esq. Debtor Harman stated that he had obtained a Chapter 7 discharge on February 12, 2001, which included the discharge of the judgment held by Creditor Davilla. As a consequence, Debtor

Harman argued that the lien that secured such judgment (in the amount of \$100,000.00) filed against real estate located at 64 North Montgomery Avenue, Youngstown, Ohio 44506 (the "Real Property") had to be released because the underlying debt had been discharged. Debtor Harman contended that, because the debt to Creditor Davilla had been discharged, Creditor Davilla could not foreclose against the Real Property. Debtor Harman acknowledged, however, that, prior to filing his Chapter 7 petition on May 1, 2000, he had transferred the Real Property to his sister, Nancy L. Sparks, in or about 1998.¹ Creditor Davilla's judgment lien was filed for record on November 19, 1996.² Debtor Harman stated that his sister ("Debtor Sparks") had subsequently filed her own Chapter 7 petition and had received a discharge and, thus, she also did not have liability to Creditor Davilla.

Debtor Harman's motion is an attempt to stop all foreclosure actions against the Real Property even though he concedes that he has no interest in such Real Property. Debtor Harman does not allege that Creditor Davilla has taken any action, other than the attempted foreclosure, to collect the discharged debt. Since Creditor Davilla has made no attempt to collect the discharged

¹Debtor Harman stated on the record at the hearing that he "gave" the Real Property to his sister in "1976." The record in the bankruptcy case of Nancy L. Sparks, Case Number 03-40063, indicates that the Real Property was transferred to Debtor Sparks on October 15, 1998 from Donald A. Harman and Mary J. Harman.

 $^{^2}$ See Motion to Avoid Judgment Lien filed by Debtor Nancy L. Sparks, Case Number 03-40063 (Docket # 10).

debt from Debtor Harman, and since the Real Property is owned by someone else, Debtor Harman does not have standing to attempt to stop the foreclosure action. The question of standing was not raised and was not addressed at the hearing.

Creditor Davilla's attorney brought to the Court's attention that the avoidance of the lien in question had already been the subject of a prior court order, dated July 31, 2003, entered in Debtor Sparks' bankruptcy case (Case Number 03-40063) by Judge Mary Ann Whipple (the "July 31, 2003 Order"). The July 31, 2003 Order specifically found that Debtor Sparks could not avoid the judgment lien in question because the lien had attached to the Real Property prior to it being transferred in her name. The Court held that § 522(f) of the Bankruptcy Code permits the avoidance of certain liens on exempt property if the lien impairs the debtor's exemption but that the debtor must have an interest in the property at the time the judicial lien is placed on the property. The Court held that Creditor Davilla's judgment lien attached to the Real Property before Debtor Sparks acquired her interest in it and, thus, Debtor Sparks did not have an interest in the Real Property when Creditor Davilla's judgment lien became "fixed" on it. As a consequence, the July 31, 2003 Order held that Debtor Sparks could not avoid Creditor Davilla's judgment lien under § 522(f). Subsequently, Debtor Sparks, acting pro se, filed a motion to reconsider the July 31, 2003 Order based on "new evidence not presented to the Court" (i.e., the underlying debt upon which the lien was based had been the subject of Debtor Harman's February 12, 2001 bankruptcy discharge).

On October 23, 2003, Judge Whipple entered a Memorandum and Order Regarding Motion for Reconsideration in which that motion was denied. The Court held that "[a]ssuming Debtor [Sparks] could show that evidence of Donald Harman's discharge in bankruptcy was in fact 'newly discovered,' . . . such evidence has no effect on the court's ruling." The Court held "[t]he additional materials supplied by Debtor [Sparks] show only that the transferor received a discharge, not that the judgment lien was avoided in his case." The Court held that Debtor Harman's prior discharge in bankruptcy discharged only his personal liability and it did not discharge the *in rem* liability or serve to avoid the judgment lien.

Based upon the prior rulings of this Court, the order to appear and show cause is overruled. The lien against the Real Property has not been avoided even though personal liability for the underlying debt has been discharged as to both Debtors Harman and Sparks.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was placed in the United States Mail this ____ day of September, 2004, addressed to:

DONALD A. HARMAN, 61 North Montgomery Avenue, Youngstown, OH 44506.

RICHARD G. ZELLERS, ESQ., 3810 Starrs Centre Drive, Canfield, OH 44406.

MATTHEW C. GIANNINI, ESQ., 1040 South Commons Place, Suite 200, Youngstown, OH 44514.

SAUL EISEN, United States Trustee, BP America Building, 200 Public Square, 20th Floor, Suite 3300, Cleveland, OH 44114.

JOANNA M. ARMSTRONG